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NO.

in the Supreme Court of the United States

October Term, 1983

CALVIN COOLIDGE GREENE,
Petitioner,

vs.

WHIRLPOOL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether the notice provision of 29 U.S.C. §626(d), which requires that a charge alleging unlawful discrimination on the basis of age be filed within 180 days of the alleged act of discrimination with the appropriate government agency, is satisfied, where:

(a) No written charge was submitted by the claimant;

(b) Within 180 days of his termination, the claimant went to the appropriate notice agency, where his statement that he believed he had been discriminated against and discharged by his employer because of his age was received.

II.

Whether the notice provision of 29 U.S.C. §626(d) is tolled where an employer fails to post notices setting forth information concerning age discrimination as required by law.

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11, 13, 16-18

Legislative History

H.R. No. 95-950, 95th Cong., 2d Sess. 12,
reprinted in [1978] U.S. Code Cong.
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House Conf. Report No. 95-950, March 14, 1978,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Calvin Coolidge Greene, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 31, 1983.

OPINIONS BELOW

The opinion of the Fourth Circuit, entered on May 31, 1983, is reported at 708 F.2d 128. It is reprinted in the Appendix, pp. 2-12, *infra*, App. A.

The opinion of the United States District Court for the Western District of North Carolina, entered May 7, 1982, is reported at 538 F.Supp. 352. It is reprinted in the Appendix, pp. 13-26, *infra*, App. B.

JURISDICTION

This civil action, brought pursuant to 29 U.S.C. §626(c) and 28 U.S.C. §1331, commenced in the United States District Court for the Western District of North Carolina. The case was heard and tried in a jury trial by that court and judgment was entered in favor of the plaintiff in the amount of $56,000.00 for lost income, $56,000.00 as liquidated damages, and $43,629.39 in attorneys' fees. A judgment and opinion to that effect being entered on May 7, 1982. 538 F.Supp. 352; App. B, *infra*. The Fourth Circuit reversed on the grounds that 29 U.S.C. §626 (d) required that the plaintiff file a written charge alleging unlawful discrimination and that plaintiff had not complied with the said provision, a judgment and opinion to that effect being entered on May 31, 1983. 708 F.2d 128; App. A, *infra*. On August 2, 1983 the Fourth Circuit entered an Order denying a petition for rehearing, as well as a suggestion for rehearing en banc. App. A, p. 1, *infra*. This petition for certiorari is filed within ninety days of the denial of rehearing. This Court has jurisdiction to review the judgment of Fourth Circuit by writ of certiorari pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The relevant portions of the federal statutes are as follows:

29 U.S.C. §626(d): No civil action may be commenced by an individual under this Section until sixty (60) days after a charge alleging an lawful discrimination has been filed with the Secretary. Such a charge shall be filed—

> (1) Within 180 days after the alleged unlawful practice occurred; or
>
> (2) In a case to which Section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceeding under state law, whichever is earlier.

Upon receiving such a charge, the Secretary shall promptly notify all persons named in such charge as prospective defendants in the actions and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

STATEMENT OF THE CASE

This action stems from petitioner Greene's termination of employment by the respondent during October 1977. Petitioner alleges that the respondent discharged him from his employment on the basis of age, which action is prohibited by the Age Discrimination in Employment Act of 1967.

A. Factual Context

In 1977 petitioner was 55 years old and was employed by the respondent as a sales territory manager. At that time, the petitioner was terminated from his employment by the respondent. Petitioner, believing that he had been discriminated on the basis of age, thereafter went to the Charlotte, North Carolina office of the United States Department of Labor,[1] where he had a conference with Department of Labor employee Bob Smith. App. B, p. 17, *infra.* Petitioner informed Mr. Smith that he had been an employee of the respondent for many years and that he believed he was being discharged solely on the basis of his age and that he was discriminated against by the respondent. Smith received petitioner's statements and thereafter told him to return when he had evidence that the defendant willfully discharged him. App. B, p. 17, *infra.* He told petitioner that he had two years in which to file suit if he found evidence of willfulness. App. B, p.

[1]As of July 1, 1979 the responsibility of enforcing the Age Discrimination in Employment Act was transferred from the Department of Labor to the Equal Employment Opportunity Commission. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979) *reprinted in* [1978] U.S. Code and Cong. News 9795.

17, *infra*. Mr. Smith also informed the petitioner that he would send him a booklet which contained information concerning age discrimination.

Thereafter, in October of 1979, prior to the expiration of two years from the time of his discharge, petitioner instituted this action praying for reinstatement in his former position and for damages and attorneys' fees.

B. Court Proceedings

The United States District Court for the Western District of North Carolina, pursuant to its jurisdiction under 29 U.S.C. §626(c) and 28 U.S.C. §1331, found that the respondent had intentionally discriminated against the petitioner on the basis of age and awarded reinstatement of the petitioner in his former employment in addition to back wages, liquidated damages and attorneys' fees. The court entered an order and opinion which stated the basis for the attorneys' fees, and the grounds for the denial of the defendant's motion for directed verdict. 538 F.Supp. 352; App. B, *infra*. The court held that the petitioner had complied with the requirements of 29 U.S.C. §626(d) in that he had filed a timely charge alleging unlawful discrimination. Furthermore, the court held that the notice period under the statute had been tolled by the respondent's failure to post notices required by law concerning the filing of age discrimination claims, and that the plaintiff had subsequently again complied with the requirements of 29 U.S.C. §626(d).

On May 31, 1983, the Fourth Circuit reversed the District Court's order. 708 F.2d 128; App. A, pp. 2-12, *infra*. The opinion stated: "Whirlpool asserts that Greene's

conversation w h Smith came far short of being a charge, and even if it did constitute a charge, it was not in writing as required by Section 626(d) and that therefore, this action must be dismissed. We agree with Whirlpool." App. A, p. 7, *infra*.

More specifically, the Fourth Circuit ruled:

(1) The court held that although 29 U.S.C. §626(d) "does not specify that a charge must be in writing", it concluded that a "*written charge* alleging unlawful discrimination must be filed within 180 days after the alleged unlawful practice occurred in order to comply with §626(d) of the ADEA as amended." App. A, p. 9, *infra*.

(2) The court held, furthermore, that the petitioner's statements to the agency employee alleging unlawful discrimination and discharge were insufficient to constitute a "charge" in that the Department of Labor enployee "did not believe that Greene charged Whirlpool with discrimination because he told him to return if he obtained information that Whirpool had discharged him because of of age." App. A, p. 7, *infra*.

(3) The court furher held: "we do not agree with the district court that the 180 day time period for filing a charge was tolled by Whirlpool's failure to post the required ADEA informational notices on its premises." App. A, p. 9, *infra*.

Judge Fairchild, although concurring in the result, filed a separate opinion in which he dissented from the view that 29 U.S.C. §626(d) required that a charge be in writing. He stated that "the term 'charge' was part of an amendment intended to make it more likely that courts would reach the merits of the case of aggrieved individuals." App. A, p. 12, *infra*. Since the legislative history was sparse and the legislation remedial, he concluded that he "would hold that unequivocal oral notice can satisy 626(d)." App. A, p. 12, *infra*.

On August 2, 1983, the Fourth Circuit denied rehearing, as well as a suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

There are two important questions arising in this civil action that warrant the grant of certiorari. The questions demonstrate a serious misapplication of an important federal statute and a disregard for the policies and principles underlying it. The erroneous application of the federal statute in question can be and should be reviewed and corrected by this Court.

1.

The decision below seriously erodes the private enforcement of the Age Discrimination in Employment Act [ADEA] and specifically undermines the purposes of the 1978 Amendments to the ADEA.

Stating that "age discrimination is often much less well understood than other forms of discrimination and therefore is often not discovered by the victim until long after the alleged act has occurred", Congress amended the ADEA "to strenghten and broaden its provisions" to "make it more likely that the courts will reach the merits of the cases of aggrieved individuals and do so more expeditiously." S.Rep. No. 493, 95 Cong., 2d Sess. 1,12, *reprinted in* [1978] U.S. Code & Ad. News 504, 515. Contrary to the result reached by the court of appeals below, congress intended the ADEA to be broad remedial legislation and in 1978 amended the statute to eliminate technicalities therein and provide greater accessibility to aged persons, and this is why certiorari should be granted.

Although Congress enacted the ADEA in 1967 to prevent discrimination against older individuals and amended the statute in 1978 "to stengthen and broaden its provisions", the decision below makes it much more difficult for the statute to serve its original purpose and erodes the amelioratory effects of the 1978 amendments. One of Congress' concerns in 1978 was that the requirements of U.S.C. §626(d), which required a notice of intent to sue to be filed with the Department of Labor within 180 days of the alleged discriminatory act, had caused courts to dismiss numerous otherwise meritorious claims. *Id.* at 12, *reprinted in* [1978] U.S. Code Cong. & Ad. News 515. Therefore, Congress adopted a lesser notice requirement: An individual need only file a charge alleging unlawful discrimination with the appropriate agency. 29 U.S.C. §626(d). The courts of appeals, however, has imposed a higher standard than the old "notice of intent to sue." Although 29 U.S.C. §626(d) now only requires a individual make a charge

alleging age discrimination to the appropriate authority, the court of appeals has engrafted an additional two part requirement onto the notice provision: (1) the "charge" must be in writing; (2) the agency employee receiving the information regarding the discrimination must subjectively believe or think that a "charge" is being made. App. A, pp. 7-9, *infra*. Ultimately the two part requirement will mean less access to the protections of the ADEA and thus weaken the enforcement of its prohibition. Thus, not only is the purpose of the amendment undone—broadening accessibility to the ADEA's protections, but the purpose of the statute—prohibition of age discrimination—is seriously eroded.

The notice provision of 29 U.S.C. 626(d) places a heavy burden on the victim of discrimination without the additional requirements created by the court of appeals. Read literally, the claimant must file a charge alleging discrimination "within 180 days after the alleged unlawful practice occurred." 29 U.S.C. 626(d). Congress thought that the notice provision, as written, caused layman sufficient difficulty to seriously consider "removing the 180 day notice requirement entirely". S. Rep. No. 493, 95 Cong., 2d Sess. 12 [1978], *reprinted in* [1978] U.S. Code & Ad. News 515. Although the notice provision was not abolished, it was, in Judge Fairchild's words, amended "to make it more likely that courts would reach the merits of the cases of aggrieved individuals." App. A, p. 12, *infra*. However, the decision below stands the amendment on its head—the merits are less likely to be reached.

Under the decision below, the aggrieved individual must first file a written charge. This means, presumably,

that even if an individual takes all the proper steps of notifying the appropriate agency in great detail of all the circumstances surrounding the discrimination, he or she will lose his or her rights simply because the statement is not in writing. Certainly, a full oral statement and interview with the appropriate agency complies with the letter and spirit of the notice provision much more fully than a short written statement stating a belief that one has been discriminated against. The court of appeals itself admits the only purpose of the notice provision is to afford the government an opportunity to conciliate. App. A, p. 8; *infra*. How is that underlying purpose better met by a writing? An oral statement to the appropriate agency serves the same purpose and can be more effective, particularly where the aggrieved party is illiterate or semi-literate.

Illiteracy is three (3) times as high for persons over the age of 45 (the ADEA covers persons between the ages of 40-70) as for the rest of the population of the United States.[2] Those aged persons who are illiterate are incapable of responding to the new requisite, made compulsory by the decision below, that a "charge" be written. Furthermore, approximately 28% of the United States population is between 40-70 years of age.[3] For a statistical breakdown of aged persons as a percentage of the population and as a percentage of the illiterate population see Appendix C. Aged persons are dependent on the provisions of the ADEA for protection from

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[2]U.S. Bureau of the Census, *Statistical Abstract of the United States, 1982-83*, (103 ed.) Washington, 1982, p. 145.

[3]*Ibid.*, p. 27

arbitrary age discrimination. The decision below impacts adversely on these important protections for both the protected class, aged persons, and particularly the subclass, illiterate aged persons. Although the statute contains no mention of a requirement that the "charge" be written and the policy underlying the notice provision allows for oral notice, the decision below mandates a writing under all circumstances. This decision, if it is allowed to stand, erects another technical hurdle to those seeking the ADEA's protections, a hurdle of which they are likely to be unaware particularly after they have given otherwise sufficient oral notice. Therefore, the requirement that the "charge" be written foisted upon §626(d) will seriously hinder private enforcement of the prohibitions of the ADEA.

The second part of the new test is also unworkable and will cause great difficulties in obtaining relief from age discrimination. The decision of the court below requires that the government employee receiving the information must "believe" the person has "charged" the offending party "with discrimination." App. A, p. 7, *infra*. There is no such subjective determination required of the appropriate agency in the statute itself. The statute simply requires that "a charge alleging unlawful discrimination" be filed. 29 U.S.C. §626(d). Since the statute is clear, and the court below states that Greene told the agency employer he believed he had been discriminated against and discharged by on the basis of age, the court of appeals decision requires more. App. A, pp. 7-8, *infra*. Therefore, the layman who has stated (or written for that matter) that he has been discriminated against by a particular party must persuade the agency employee to whom he or she happens to contact that he or she is, in fact, making "a

charge"; of, if Judge Fairchild's approach is adopted, he or she must make sure the charge is "unequivocal." App. A, p. 10, *infra*. When does the charge become unequivocal or the government employee become subjectively convinced? Surely it asks considerable appreciation of legal niceties for a layman to know when he has become equivocal or unequivocal in his "charge". Furthermore, there is no ground in the statute or case law which supports the view of the court of appeals that the subjective impression of the governmental employee is controlling or even important. It is simply a question of law, not one of the impression of a clerk. However, given the decision below, countless aged laymen will lose their rights by equivocating or being less than equivocal or by their failure to adequately stir a government employee; therefore, the ultimate beneficiary of the decision below is the discriminator, not the discriminated.

Not only do the conclusions of the court of appeals undermine the purpose of the statute, but the analysis contained in its opinion is suspect. This Court has stated that in interpreting federal statutes its purpose is to divine the intent of Congress and has primarily focused on three indica of that intent: 1) the language of the statute; 2) the legislative history of the statute; 3) the policies underlying the statute. *Mahasco Corp. v. Silver*, 447 U.S. 807, 816 (1980). However, the court of appeals fails to apply this basic framework analysis in this case, which is simply a question of statutory interpretation.

The language of the statute itself neither addresses the question of whether a charge should be in writing, nor does it pass upon the verbage necessary to constitute a

charge. There is little in the legislative history which sheds light on the first point, except that the House Conference Report includes a statement that "the 'charge' requirement will be satisfied by the filing of a written statement." House Conf. Report No. 95-950, March 14, 1978, 12, *reprinted in* [1978] U.S. Code Cong. and Ad. News, 1806. Although this unquestionably is pertinent legislative history, it raises more questions than it provides answers. This language does not appear in the statute, and it is unclear whether the report is talking about one way it envisions the "charge" to be filed or the only way to file a charge. It is not clear whether the writer(s) of the report were stating a minimum method of disclosure by the individual to comply with the statute or one method of many of meeting the requirements of §626(d). The court of appeals failed to take note of the fact that numerous lower federal courts had interpreted the more rigorous "intent to sue" standard to be satisfied by oral notice. *E.g.*, *Woodford v. Kinney Shoe Corp.*, 369 F.Supp. 911 (N.D. Ga. 1973). Since Congress failed to add the requirement of a written charge in 1978 and Congress is presumed to be aware of relevant court decisions, *Cannon v. University of Chicago*, 441 U.S. 677, 696-698 (1979), there is strong evidence that Congress intended the law to remain the same and the legislative history merely stated a preference for a written charge. Given that the position of the court of appeals—total capitulation to the ambiguous statement in the legislative history—is inconsistent with the policies underlying the statute, these several lines of legislative history are a very thin reed upon which to construct a roadblock to claims made under an important federal statute.

However, on the second point, the language necessary to constitute a "charge", the legislative history is more specific and the court of appeals below disregarded or overlooked the specific statement of Congress as to the definition of a "charge", although the definitive language was contained in the court's opinion. App. A, p. 9, *infra*. The definition of a charge was stated in the Conference Committee's report as follows:

> The Conferees intend that the 'charge' requirement will be satisfied by the filing of a written statement *which identifies the potential defendant and generally describes the action believed to be discriminatory.*

H.R. No. 95-950, 95th Cong., 2d Sess. 12, *reprinted in* [1978] U.S. Code Cong. & Ad. News 534 (emphasis added).

The court of appeals failed to consider or discuss one crucial indicia of legislative intent—the policy underlying the statute. Here, this is doubly important as the policy underlying the statute must be construed along with the policy and purpose of the amendment. The policy underlying the ADEA is essentially remedial, and "the statute is to be construed liberally to achieve its purpose of protecting older employees from discrimination. . . . A procedural requirement of the Act, of doubtful meaning in a given case, should not be interpreted to deny an employee a claim for relief unless to do so would clearly further some substantial goal of the Act." *Moses v. Falstaff Brewing Corporation*, 525 F.2d 92, 93-94 (8th Cir. 1975). The decision below not only fails to take into account the policies underlying the statute, but stands in contradiction to those purposes.

When the additional requisites created by the court of appeals are added to its holding disregarding employer's failure to post statutory notices regarding the ADEA, it is apparent the decision below significantly narrows the scope and coverage of the ADEA simply on technical grounds at the expense of the rights created thereunder. Contrary to this Court's admonition in *Love v. Pullman*, 404 U.S. 522, 527 (1972), to avoid creating the "additional technicality," the court of appeals has done more than that—it has created several additional technicalities. "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process." *Id.* at 528.

An example demonstrates the inherent lack of internal logic of the decision below. One person, who is illiterate or semi-literate, after becoming a victim of age discrimination, visits the appropriate notice agency and gives a detailed history of the job he has held (or applied for), the acts of discrimination involved, the persons involved, and presents documentary evidence in writing of the discriminatory act or acts (rather than a written charge). He or she cannot avail themselves of the protection of the ADEA, under the decision below, because he or she has failed to make a written "charge". It would make no difference how much information was provided or how many written documents were produced, the admittedly victimized individual would have no recourse. Under the decision below, it would make no difference if there were no statutory notices posted at his or her place of employment or if he or she were illiterate and could not write a word. A second person could, under the court of appeals decision, make a written statement alleging all the requisites of §626(d), but if the employee receiving the "charge" did not

believe that he was making a "charge", then he or she would lose his or her rights. However, if a third person made a one line written statement and the government clerk receiving the statement believed a "charge" had been made—"presto," a "charge" exists.

In light of these results, the Fourth Circuit's holding contrary to the language of the statute, the purposes of the statute and congressional intent should not go unreviewed and unchallenged.

2.

The decision below causes confusion in the interpretation of the ADEA by conflicting with the precedents of this Court and the decisions in and of other circuits.

The court of appeals held that 29 U.S.C. §626(d) required "that a *written charge* alleging unlawful discrimination must be filed within 180 days of the alleged unlawful practice occurred in order to comply with §626(d)," and that the 180 day time period of §626(d) was not tolled by the respondents "failure to post the required ADEA informational notices on its premises." App. A, p. 9, *infra*. Not only does the analysis underlying this statutory interpretation conflict with the precedents of this Court, the holdings themselves conflict with interpretations of the ADEA by other circuits and courts. The confusion caused by this decision should be undone, and this is why certiorari should be granted.

There are two fundamental points on which the decision below conflicts with decisions of other circuits

and courts. Although the court of appeals admitted that under "exceptional circumstances" the requirements of §626(d) could be "tolled or waived," it held that the respondent's failure to post informational notices required by the ADEA did not toll the provision. App. A, p.9, *infra*. However, the Seventh Circuit held in *Kephart v. Institute of Gas Technology*, 581 F.2d 1287, 1289 (7th Cir. 1978), *cert. denied*, 450 U.S. 959 (1981), and again in *Posey v. Skyline Corporation*, 702 F.2d 102, 105 (7th Cir. 1983) that the failure to post informational notices automatically tolled the 180-day period. The contrast between the two holdings is stark:

Seventh Circuit's holding in Posey

> [T]o insure that employers would not breach the posting requirement without penalty, as well as to effectuate the remedial purposes of the ADEA, we concluded in *Kephart* that the 180-day period was tolled by an employer's failure to post a conspicuous notice of ADEA rights (702 F.2d at 105).

Fourth Circuit's holding in Greene

> [W]e do not agree with the district court that the 180-day time period for filing was tolled by Whirlpool's failure to post the required ADEA informational notices on its premises. (App. A, p.9, *infra*).

Therefore, the decisions of the two circuits are completely at odds, and certiorari should be granted to resolve the conflict.

The decision below also conflicts with the decisions in and of other circuits on the issue of whether the "charge" must be in writing. Numerous district courts have held that §626(d) does not require the "charge" (or "notice of intent to sue" under the prior law) to be written. *E.g., Noto v. J.F.D. Electronics Corp.*, 446 F. Supp. 92 (E.D.N.C. 1978). Given that a number of district courts have held that oral notice is sufficient to constitute a "charge", the decision will add additional confusion to an already murky area of the law. When these decisions are added to the opinion of the Eighth Circuit in *Jennings v. American Postal Workers Union*, 672 F.2d 712 (8th Cir. 1982) which holds, at least by implication, that a "charge" may be oral under Title VII's analogous 180 day requirement, review and correction of the decision below becomes even more crucial.

Not only does the decision below conflict sharply with other courts and circuits, it contravenes principles enunciated by this Court in the area of statutory construction. Since there is no precise statutory language which addresses either the written/oral question or the exact contents of the "charge", the interpreting court is to be guided by the intent of Congress which intent is to be discerned from the policy underlying the statute, its purposes, as well as jurisprudential considerations of equity and fairness. *Philbrook v. Clodgett*, 421 U.S. 707, 713-714 (1975). Although legislative history is a part of that consideration, the court is to examine and apply the statute as a whole, taking into account its full impact and implication. *Id.*; *See also Cannon v. University of Chicago*, 441 U.S. 677 (1979). The decision below fails to make even the most rudimentary inquiry into the factors enunciated by this Court, and this is a disturbing precedent in both the area of statutory construction

and the application of an important federal statute which should not go unreviewed.

If the court of appeals' decision is allowed to go unreviewed, technical form will not only destroy substantive rights but the confusion which ensues will be time consuming, debilitating and cause further destruction of substantive rights. To prevent this confusion, certiorari should be granted.

CONCLUSION

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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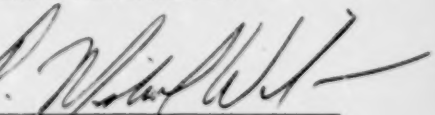
By 
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CERTIFICATE OF SERVICE

The undersigned certifies that he has this day served the foregoing Petition for Certiorari and three copies by depositing the said copies thereof with first class postage prepaid affixed thereto on the 25 day of October, 1983 in the United States Post Office at Charlotte, North Carolina, pursuant to Supreme Court Rule 28.3, on counsel for respondent, at counsel for the respondent address:

Julia V. Jones
Moore, Van Allen and Allen
3300 NCNB Plaza
Charlotte, North Carolina 28280

This the 25 day of October, 1983.

C. Michael Wilson

Appendix

APPENDIX A

[FILED AUG 2 1983]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1635

Calvin Coolidge Greene,

Appellee,

versus

Whirlpool Corporation,

Appellant.

ORDER

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Widener, Jr., Judge Hall and Judge T. E. Fairchild (7th Cir.).

For the Court,

/s/ William K. Slate, II
CLERK

Calvin Coolidge GREENE, Appellee,

v.

WHIRLPOOL CORPORATION,
Appellant,

No. 82-1635.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 10, 1983.

Decided May 31, 1983.

Discharged employee sued employer charging violation of Age Discrimination in Employment Act. The United States District Court for the Western District of North Carolina, James B. McMillan, J., 538 F.Supp. 352, rendered judgment on jury verdict for former employee, and employer appealed. The Court of Appeals, K.K. Hall, Circuit Judge; held that: (1) written charge alleging unlawful discrimination must be timely filed with the agency, and (2) the 180-day period was not tolled by employer's failure to post informational notices as employee had actual knowledge of the 180-day filing requirement.

Reversed.

Fairchild, Senior Circuit Judge, sitting by designation, filed concurring opinion.

1. Civil Rights —33

Written charge alleging unlawful discrimination must be filed within 180 days after the alleged unlawful practice occurred in order to comply with Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, §7(d), as amended, 29 U.S.C.A. §626(d).

2. Civil Rights —38

Requirement of Age Discrimination in Employment Act that charge be filed with the agency within 180 days after alleged unlawful practice occurred is not a jurisdictional prerequisite to suit in federal court and under exceptional circumstances may be tolled or waived. Age Discrimination in Employment Act of 1967, §7(d), as amended, 29 U.S.C.A. §626(d).

3. Civil Rights —33

The 180-day period for filing administrative charge under Age Discrimination in Employment Act was not tolled by employer's failure to post required informational notices on its premises where from employee's first visit to Department of Labor he acquired actual notice of fact that a charge must be filed within that period. Age Discrimination in Employment Act of 1967, §7(d), as amended, 29 U.S.C.A. §626(d).

John T. Allred, Charlotte, N.C. (Julia V. Jones, Moore & Van Allen, Charlotte, N.C., on brief), for appellant.

C. Michael Wilson, Charlotte, N.C. (Griffin, Gerdes, Mason, Brunson & Wilson, Charlotte, N.C., on brief), for appellee.

Before WIDENER and HALL, Circuit Judges, and FAIRCHILD,* Senior Circuit Judge.

K.K. HALL, Circuit Judge:

Whirlpool Corporation (Whirlpool) appeals from a judgment entered on a jury verdict for Calvin Coolidge Greene (Greene) in his suit alleging violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§621—634. The issue for our consideration is whether Greene filed a charge of discrimination within 180 days of his alleged unlawful discharge as required under §626(d) of the ADEA, as amended. The district court held that a timely charge had been filed. We disagree, and therefore, reverse the judgment below.

I.

Greene was discharged from his job with Whirlpool on October 31, 1977. Approximately two weeks later, on either November 17 or 18, 1977, Greene went to the Charlotte, North Carolina office of the United States

*Honorable Thomas E. Fairchild, Senior Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

Department of Labor (DOL),[1] where he spoke with DOL employee Bob Smith. Greene testified at trial that he told Smith, "that I had worked for the Whirlpool Corporation all these years and that my performance had been okay, as far as I could determine; that the only reason I could see that they discharged me was discriminating on age because I was six weeks past 55." Greene further testified that Smith told him he would be sent a booklet which explained discrimination cases, and then Smith stated "if you find out enough information on it [Greene's alleged discriminatory discharge] you get back with us." Greene acknowledged that he received and read the booklet mailed to him which contained the ADEA, as amended, including the requirement that a charge of discrimination must be filed within 180 days of the alleged unlawful practice.

In October, 1979, after his former supervisor, Spagnuolo, had obtained a $51,977 jury verdict against Whirlpool for age discrimination,[2] Greene returned to the DOL. He spoke with another DOL employee about filing an age discrimination suit against Whirlpool. However, the DOL files do not reveal any charge filed by Greene against Whirlpool or show any correspondence

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[1]In 1977, when Greene was required to file a charge, the DOL was the enforcing agency for the ADEA. However, on July 1, 1979, the responsibility for enforcement of the ADEA was transferred to the Equal Employment Opportunity Commission (EEOC) Reorg Plan No. 1 of 1978, C.F.R. 321 (1979), reprinted in [1978] U.S. Code Cong. & Ad. News 9795.

[2]*Spagnuolo v. Whirlpool Corporation*, 467 F.Supp. 364 (W.D.N.C. 1979), *aff'd in part, rev'd in part* 641 F.2d 1109 (4th Cir. 1981).

between the DOL and Greene, other than a record showing that Greene was mailed a copy of the ADEA in November, 1977.

On October 26, 1979, Greene instituted this age discrimination suit. Whirlpool's main defense was that Greene had not filed a charge with the DOL within 180 days after this alleged unlawful discharge, as required by the statute. The district court, however, was not persuaded by this contention and concluded that Greene had filed a timely charge during his first visit to the DOL in November, 1977, and had thereby sufficiently complied with the 180-day notice requirement of §626(d). Moreover, the district court found that Whirlpool, from 1977 through 1979, had failed to post the required ADEA informational notices on its premises in Charlotte, North Carolina, including the requirement that a charge be filed within 180 days. The district court, therefore, concluded that even if Greene's 1977 visit to the DOL did not meet the charge requirement of the statute, circumstances warranted tolling the 180-day filing period until September, 1979, when Greene retained an attorney and acquired actual knowledge of his rights. Further, the district court held that Greene's visit to the DOL in October, 1979, represented a second timely filing of a charge.

The jury thereafter returned a verdict for Greene. In addition, the district court awarded Greene liquidated damages, costs and attorneys' fees and ordered Wirlpool to reinstate Greene to a position equal to the one from which he had been discharged. From the judgment entered in favor of Greene, Whirlpool appeals.

II.

On appeal, the pivotal inquiry is whether the lower court correctly determined that Greene filed a charge alleging unlawful discrimination with the DOL within 180 days of his discharge. Greene contends that he filed an oral charge of discrimination during his first visit to the DOL. In contrast, Whirlpool asserts that Greene's conversation with Smith came far short of being a charge, and that even if it did constitute a charge, it was not in writing as required by §626(d); and that therefore, this action must be dismissed. We agree with Whirlpool.

The express language of §626(d) of the ADEA, as amended in 1978, requires the filing of a charge. This section reads, in pertinent part:

> (d) No civil action may be commenced under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred . . .

In the present case, Greene, on his initial visit to the DOL merely mentioned to Smith, a DOL employee, that he thought he had been discriminated against because of his age. Obviously, Smith did not believe that Greene charged Whirlpool with discrimination because he told him to return if he obtained information that Whirlpool had discharged him because of his age. Moreover, Greene himself could not have believed that he filed a charge at that time or he would not have

returned to the DOL in October, 1979. Hence, Greene's initial visit to the DOL was simply a request for information concerning age discrimination and nothing more.

Important to our consideration is the underlying purpose of §626(d), and the legislative history is instructive in this regard. Prior to 1978, §626(d) required that a "notice of intent to sue" be filed with the DOL. In 1978, this provision was amended to require that a "charge alleging unlawful discrimination" be filed with the DOL.[3] In approving this amendment, the Conference Committee reported:

> This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation.

H.R. No. 95-950, 95th Cong., 2 Sess. 12, *reprinted in* [1978] U.S.Code Cong. & Ad. News 504, 534. In the present case, because the Secretary had no knowledge of Greene's allegation of discrimination against Whirlpool, no opportunity existed for any informal methods of conciliation, conference and persuasion, as required by

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[3]This amended version is effective "with respect to civil actions brought after the date of enactment of this act [April 6, 1978]" Public Law 95-256, Section 4(b)(2). Therefore, it is applicable to the instant case, which was filed on October 26, 1979.

§626(b), before the initiation of the suit. This is patently contrary to the purpose of the notice requirement.

[1] Furthermore, although §626(d) does not specify that a charge must be in writing, the Conference Committee's report is again enlightening. It states: "The conferees intend that the 'charge' requirement will be satisfied by the *filing of a written statement* which identifies the potential defendant and generally describes the action believed to be discriminatory." *Id.* (emphasis added). We find, as did the Second Circuit, in *Reich v. Dow Badische Co.*, 575 F.2d 363 (2d Cir.), *cert. denied* 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978), when considering the earlier version of the statute, that §626(d), by requiring a charge to be filed, implies that it must be written. We therefore conclude that a *written charge* alleging unlawful discrimination must be filed within 180 days after the alleged unlawful practice occurred in order to comply with §626(d) of the ADEA, as amended.

[2, 3] We recognize that the 180-day provision of §626(d) is not a jurisdictional prerequisite to a suit in federal court, and may under exceptional circumstances be tolled or waived. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1981). Nevertheless, we do not agree with the district court that the 180-day time period for filing a charge was tolled by Whirlpool's failure to post the required ADEA informational notices on its premises. The evidence clearly reveals that from Greene's first visit to the DOL in November, 1977, he acquired actual knowledge of the fact that a charge alleging discrimination must be filed with the DOL within 180 days after the alleged unlawful practice occurred. Therefore, under these

circumstances, there is nothing to warrant the tolling of the usual 180-day filing requirement.

III.

For the reasons stated, we conclude that Greene's failure to comply with §626(d) is a bar to maintaining this action. Therefore, the other issues raised by Whirlpool on appeal need not be addressed. Accordingly, we reverse the judgment of the district court.

REVERSED.

FAIRCHILD, Senior Circuit Judge, concurring.

In substance, the district court found that Greene's conversation with Smith at the Department of Labor was, although oral, an unequivocal assertion, or "charge," that defendant had discriminated against Greene on account of age. In the light of all the circumstances, I agree that the finding of an unequivocal oral charge was clearly erroneous. I also agree that a case was not made out for tolling the 180 day filing requirement.

There having been no unequivocal oral charge of age discrimination, it seems unnecessary to decide whether a charge of age discrimination must be presented in writing in order to have been "filed." *Cf.* the fact situation presented in *Dickerson u Deluxe Check Printers, Inc.*, 703 F.2d 276, 283-84 8th Cir.1983).

If, however, the matter of written versus oral form is to be decided, it seems to me that the reasons

for deeming an unequivocal oral charge sufficient preponderate.

Judge, now Chief Judge, Feinberg stated those reasons well in dissent in *Reich v. Dow Badische Co.*, 575 F.2d 363, 375-76 (2d Cir.1978).

> It must be conceded at the outset that use of the word "filed" implies that the notice should be in writing. But the section does not make that requirement explicit and there are compelling reasons for not reading it into the statute. The ADEA is remedial legislation whose enforcement in large part depends upon the efforts of laymen. The terms of this statute should be liberally construed ... to avoid frustating potentially meritorious claims on hypertechnical grounds. See *Bonham v. Dresser Industries, Inc.* 569 F.2d 187, 193 (3rd Cir.1977); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 93-94 (8th Cir.1975); cf. *Love v. Pullman Co.*, 404 U.S. 522, 527, 92 S.CT. 616 [619], 30 L.Ed.2d 679 (1972) (Title VII case). Moreover, the sparse legislative history on this point indicates that unequivocal oral notice should be sufficient. The Act as a whole reflects "a congressional desire to avoid some of the administrative logjams experienced under Title VII" and to simplify enforcement mechanisms. Comment, Procedural Prerequisites to Private Suit Under the Age Discrimination in Employment Act, 44 U.Chi.L.Rev. 457, 467 (1977).... See also 133 Cong. Rec. 7076 (1967) testimony of Sen. Javits before the Labor Subcommittee of the Senate Labor and Public Welfare Committee regarding the ADEA). Thus, in enacting the ADEA, Congress declined to require that notice "shall be in writing under oath

or affirmation . . . ," as was done in Title VIII, 42 U.S.C. §2000e-5(b). Additionally, the Department of Labor, the agency charged with administering the ADEA, has urged that oral notice can satisfy section 626(d). See Brief for the United States as Amicus Curiae, *Shell Oil Co. v Dartt*, 434 U.S. 99, 98 S.Ct. 600, 54 L.Ed.2d 270 (1977) (leave to file denied). In light of the strong policy favoring a simplified construction of procedural requirements under the ADEA, the pertinent legislative history and the Department of Labor's administrative interpretation, I would hold that unequivocal oral notice can satisfy section 626(d). See, e.g., *Woodford v. Kinney Shoe Corp.*, 369 F.Supp. 911, 914 (N.D.Ga.1973); *Bishop v. Jelleff Assoc.*, 398 F. Supp. 579, 593 (D.D.C. 1974); and *Sutherland v. SKF Industries, Inc.*, 419 F.Supp. 610, 615-16 (E.D.Pa.1976).

Reich involved the statute when it required filing of a "notice of intent to sue." The change to the term "charge" was part of an amendment intended to make it more likely that courts would reach the merits of the case of aggrieved individuals. S.Rep. No. 493, 95th Cong. 1st Sess. 12, reprinted in [1978] U.S.Code Cong. & Ad.News 515; H.Rep. No. 950, 95th Cong. 2d Sess. 12, reprinted in [1978] U.S.Code Cong. & Ad.News 533-34. Therefore the reasoning of Judge Feinberg applies even more forcefully now.

APPENDIX B

Calvin Coolidge GREENE, Plaintiff,

v.

WHIRLPOOL CORPORATION, Defendant.

No. C–C–79-329-M.

United States District Court,
W. D. North Carolina,
Charlotte Division.

May 7, 1982.

In an action under the Age Discrimination in Employment Act, the District Court McMillan, J., held that: (1) the employer's failure to post notices required under the Act tolled the 180-day limitation period: (2) the evidence established that the employer discriminated on the basis of age; and (3) the plaintiff's attorneys were entitled to recover fees in the amount of $42,500 and costs in the amount of $1,129.39.

Ordered accordingly.

1. Civil Rights—44(6)

In age discrimination action, evidence supported conclusion that employer knew of its requirement to post notice setting forth information appropriate to effectuate purposes of Age Discrimination in Employment Act, but nevertheless wilfully failed, during years 1977 through 1979, to post and keep posted those required notices. Age Discrimination in Employment Act of 1967, §7, 29 U.S.C.A. §626.

2. Civil Rights—34

The 180-day time period for filing charge under Age Discrimination in Employment Act was tolled by employer's failure to post required notices of Age Discrimination in Employment Act rights, and, therefore, time period did not begin to run until plaintiff retained attorney and acquired actual knowledge of his rights; charge filed approximately one month after plaintiff retained attorney was timely. Age Discrimination in Employment Act of 1967, §7(d), 29 U.S.C.A. §626(d).

3. Civil Rights—44(6)

Evidence was sufficient to sustain verdict in favor of plaintiff in age discrimination action. Age Discrimination in Employment Act of 1967, §2 et seq., 29 U.S.C.A. §621 et seq.

4. Civil Rights—46

In setting attorney fees under Age Discrimination in Employment Act, district court is required to consider same guidelines for setting fees as in Title VII actions. Age Discrimination in Employment Act of 1967, §§2 et seq., 7(b), 29 U.S.C.A. §§621 et seq., 626(b); Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. §2000e et seq.

5. Civil Rights—46

In age discrimination action, reasonable attorney fees in favor of prevailing plaintiff were $42,500, plus expenses in amount of $1,129.39.

C. Michael Wilson, Gerdes, Mason, Brunson & Wilson, Charlotte, N.C., for plaintiff.

John T. Allred, Moore & Van Allen, Charlotte, N.C., for defendant.

ORDER DENYING MOTION TO DISMISS FOR FAILURE TO FILE TIMELY CHARGE

McMILLAN, District Judge.

This action under the Age Discrimination in Employment Act was tried before this court and a jury beginning on March 22, 1982, and ending on March 25, 1982, when plaintiff received a jury verdict in his favor on all issues.

Defendant had earlier moved to dismiss plaintiff's complaint on the ground that plaintiff had failed to

comply with the notice requirements of 29 U.S.C. §626(d). That section requires a plaintiff to file a charge alleging unlawful discrimination with the Secretary of Labor within 180 days of the alleged discriminatory act. This court concluded that the plaintiff had complied with the provisions of Section 626(d) and in an order filed May 9, 1980, to which specific reference is made, denied defendant's motion to dismiss.

At trial, at the close of the plaintiff's evidence, the defendant moved for a directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, on the ground that the plaintiff had failed to comply with the 180-day notice requirement of Section 626(d), and that the evidence was insufficient to support findings of discrimination. Defendant renewed said motions at the close of all the evidence. (The parties stipulated that the mixed questions of fact and law presented by defendant's motion for a directed verdict because of alleged failure to comply with §626(d) would be heard and decided by the court.)

The court, sitting without a jury, finds as facts and concludes as matters of law:

Plaintiff was discharged from his job with defendant on October 31, 1977, and his age was a causative or determining factor—a "but for" factor—in the defendant's decision to discharge him. Defendant's discriminatory conduct toward plaintiff was wilful and plaintiff's discharge was not effected in good faith.

Following his discharge, the plaintiff, in November, 1977, went to the Charlotte office of the United States

Department of Labor, where he met with Mr. Bob Smith. The plaintiff told Mr. Smith at that time that he had been fired from his job with Whirlpool Corporation on October 31, 1977, when he was just above the age of 55 years. The plaintiff further told Mr. Smith that he thought that the defendant had discharged him because of his age and that the defendant had discriminated against him because of his age. Mr. Smith received this information from the plaintiff and at that time told him to return to the Department of Labor when he had obtained evidence or information that the defendant had wilfully discharged him because of his age, and that he had two years from the time he was fired within which to do so. Mr. Smith further told the plaintiff that he would mail him a booklet about the Age Discrimination in Employment Act because the Department of labor was out of such booklets at the time. (Mr. Smith did thereafter mail to Mr. Greene such a booklet but the evidence does not show that Greene read and understood it, nor that, absent knowledge that defendant's actions were wilful, he should have known from the booklet that he had to file a charge right away.) Mr. Greene left the Department of Labor reasonably believing he had filed a charge alleging unlawful discrimination due to age.

Plaintiff retained counsel in September 1979. He did not obtain or learn of any evidence that the defendant had wilfully discharged him because of age until a few weeks before the trial in October, 1979, of the case known as *Spagnuolo v. Whirlpool Corporation*, 467 F.Supp. 364 (W.D.N.C. 1979), 641 F.2d 1109 (4th Cir.1981). The first evidence Mr. Greene had as to wilful action by the defendant was obtained by him in September and October, 1979, by reading the deposition taken in the *Spagnuolo*

case and talking to persons involved in that case. Mr. Greene then returned to the Department of Labor, where he informed Mr. Fred Carlock of the Charlotte Office of the United States Department of Labor of the evidence of the wilfulness on the part of the defendant which he had learned from the *Spagnuolo* case. Mr. Greene thereafter filed his suit, on October 26, 1979, five days before the two-year statue of limitations ran.

[1] Section 626 of the ADEA requires that:

> Every employer ... shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate effectuate the purposes of this Chapter.

The court finds that defendant knew of this posting requirement, but nevertheless wilfully failed, during the years 1977 through 1979, to post and keep posted on its premises in Charlotte, North Carolina, the required notices.

Section 626(d) of the ADEA, as amended in 1978, reads as follows:

> (d) No civil action may be commenced under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed —
>
> (1) within 180 days after the alleged unlawful practice occurred;. . . .

This amended version is effective "with respect to civil actions brought after the date of enactment of this act" (April 6, 1978). Public Law 95-256, Section 4(b)(2). Hence, it is applicable to this case, which was filed on October 26, 1979.

The Supreme Court recently held that the 180-day time limit for filing a charge of discrimination under Title VII is not jurisdictional but is in the nature of a statute of limitations, and therefore subject to waiver, estoppel, and equitable tolling. *Zipes v. Trans World Airlines, Inc.*, — U.S. — , 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Congress intended the ADEA filing requirement also to be non-jurisdictional, and the courts have followed this view. See Conference Report on the 1978 Amendments to the ADEA, which states that

> The "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and therefore equitable modification for failing to file within the time period will be available to plaintiffs under the Act. 1978 U.S.Code Cong. and Admin.News 528.

SEE ALSO Wright v. State of Tennessee, 628 F.2d 949, 952-53 (6th Cir. 1980) *(en banc)*, and cases cited therein.

[2] The ADEA is remedial and humanitarian legislation. Congress gave to the courts the power "to grant such legal or equitable relief as may be appropriate to effectuate the purposes" of the act. 29 U.S.C. §626(b). This court concludes, therefore, that (1) plaintiff filed a charge of discrimination in November 1977, in his first visit to the Department of Labor; (2) the 180-day time

period for filing a charge was tolled by the defendant's failure to post required notices of ADEA rights; (3) this period did not begin to run until September, 1979, after plaintiff retained an attorney and acquired actual knowledge of his rights under the Act; and (4) plaintiff filed a second timely charge of discrimination in October, 1979, when he complained to the Labor Department a second time. *See e.g., Jennings v. American Postal Workers' Union*, 672 F.2d 712, 28 FEP Cases 518 (8th Cir. 1982) (Title VII case applying *Zipes* to construe employee's visit to the EEOC as the filing of a charge); *Dartt v. Shell Oil Company*, 539 F.2d 1256, 1260 (10th Cir. 1976).

Plaintiff complied with the provision of §626(d). Defenant's motion for a directed verdict on this ground is DENIED. The court will not re-phrase the anaiysis in its order of May 9, 1980, which has been incorporated by reference in this order. However, as stated in the May 9, 1980 order:

> In this case [*Spagnuolo v Whirlpool*], Mr. Spagnuolo filed a claim within the period during which Mr. Greene's filing was required under the statute. The information on which Mr. Greene might have based a decision to go to the Labor Department again and pursue the claim in some more aggressive manner was not accessible to Mr. Greene. Even lacking the knowledge of his supervisor's sworn testimony that Greene had been fingered for a fabricated bad work record and eventual firing because of his age, Mr. Greene went to Labor and told them he felt he had been fired because of his age. There is no evidence that

Mr. Greene was not in good faith either in posing his initial complaint or in deciding not to do more.

Whirlpool has been in court and has investigated and litigated the web of facts surrounding the firings or demotions of Mr. Spagnuolo, Mr. Greene and one further employee (Vance). Mr. Spagnuolo testified under oath that he had been told to fire Greene on trumped up evaluations because of Greene's age; it is hardly remarkable that Mr. Spagnuolo felt justified in filing charges against Whirlpool in no uncertain terms. Mr. Greene, a lower echelon employee who had no one to fire and no management friends who were privy to higher-level conversations, went no further than to complain in person to the Department of Labor. He went far enough.

[3] Defendant also contends the evidence was not sufficient to support a verdict of age discrimination. I cannot agree; the evidence of age discrimination, both direct and circumstantial, was strong; and the jury reached the correct result.

ACCORDINGLY, IT IS THEREFORE ORDERED:

1. This court has jurisdiction over this action.

2. There was ample evidence of unlawful discrimination against plaintiff based on his age.

3. There was sufficient compliance by the plaintiff with the 180-day notice period of Section 626(d) to

accomplish the statutory purpose of that section and the plaintiff filed a timely charge alleging unlawful discrimination during his first visit to the Department of Labor in November, 1977.

4. The 180-day notice period of Section 626(d) of the Age Discrimination in Employment Act is equitably tolled until September of 1979, and the plaintiff filed a second charge alleging unlawful discrimination during his second visit to the Department of Labor in October 1979.

5. The defendant's motion for directed verdict is denied.

ORDER ALLOWING ATTORNEYS' FEES

On this date, this court is entering a final judgment on the jury's verdict in favor of plaintiff in this action under the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* Plaintiff's attorneys have filed a petition for an award of attorneys' fees and costs under 29 U.S.C. §626(b) and §216(b). Plaintiff is the prevailing party and is entitled to fees under these sections of the statute.

Plaintiff's primary trial counsel, Mr. C. Michael Wilson, has submitted an affidavit which itemizes the time spent and the costs that plaintiff's counsel have incurred. Both parties have briefed the issue of fees.

[4] In setting an attorney's fee under the Age Discrimination in Employment Act, the court is required

to consider the twelve guidelines for setting fee awards in Title VII actions. *See Spagnuolo v. Whirlpool*, 641 F.2d 1109, 1115 (4th Cir. 1981); *Walston v. School Board*, 566 F.2d 1201, 1204-05 (4th Cir. 1977). These guidelines were originally set out in the case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and adopted by the Fourth Circuit in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978).

In the recent case of *Anderson v. Morris*, 658 F.2d 246 (4th Cir. 1981), the Fourth Circuit reviewed the manner in which the *Johnson* factors are to be applied by the district court. A base amount for the fee award is to be determined by multiplying the number of hours reasonably expended on the case by the customary hourly rate of compensation (*Johnson* factors one and five). This amount may then be adjusted by the court upward or downward on the basis of the other ten *Johnson* factors to determine the final fee award.

1. *The time and labor expended.*—The affidavit of plaintiff's counsel demonstrates that, through the trial, which was concluded on March 25, 1982, three attorneys have worked a total of 468¾ hours on this case. There does not appear to have been any duplication of effort by the attorneys.

5. *Customary fee for like work.*—Plaintiff's attorneys have requested fees of $75.00 per hour for Mr. C. Michael Wilson, $75.00 per hour for Mr. James L. Mason, and $100.00 per hour for Mr. Phillip E. Gerdes. These rates are within the range of charges customarily made in this area for similar work.

The court thus determines initially that plaintiff is entitled to attorneys' fees of $35,356.25 (460¾ hours at $75 an hour plus 8 hours at $100 an hour).

2. *The novelty and difficulty of the questions raised.*—This case involved several unsettled legal questions, such as whether, under recent case law, plaintiff had met the statutory requirement that he file an administrative charge of discrimination prior to filing suit. In addition, the case involved sharply contested factual questions, which required plaintiff's attorneys to compile and present an extensive factual record. This factor justifies an upward adjustment of the fee award.

3. *The skill required.*—Plaintiff's attorneys were required to do extensive discovery, organize a substantial factual record, and conduct a four-day trial. In addition, they were required to brief and argue several difficult issues of law. Their work reflected a high level of skill and competence. The fee award is to be adjusted upward on the basis of this factor.

4. *The preclusion of other employment by the attorneys because they handled this case.*—This case has been pending for over two and a half years, and has precluded other employment by counsel to the extent that they devoted 468¾ hours to it.

6. *Whether the fee is fixed or contingent.*—This is a contingent fee case. The risks inherent in contingency fee litigation justify an upward adjustment in the attorneys' fee award.

7. *Time limitations imposed by the client or the circumstances.*—This factor does not seem particularly relevant.

8. *The amount involved and the results obtained.*—Plaintiff was vindicated by the jury's verdict on his claim of wrongful discharge. He has recovered $56,000.00 in lost income as a result of the wrongful discharge, as well as liquidated damages of $56,000.00 based upon the jury's finding (which the court adopts) that the actions of the defendant in discharging the plaintiff were wilful. In addition, the court has ordered that plaintiff be reinstated to the Charlotte territory sales position which he held prior to his demotion and discharge, with all financial and other benefits of that position. The court concludes from these results that plaintiff fully prevailed on his claims in this lawsuit. The fee award will be adjusted upward on the basis of this factor.

9. *Experience, reputation and ability of the attorneys.*—Plaintiff's attorneys are members of a five-man firm in Charlotte. Mr. Wilson, plaintiff's primary trial attorney, was admitted to the North Carolina Bar in 1976. Mr. Mason was admitted in 1972, and Mr. Gerdes was admitted in 1964. These attorneys have had substantial experience, and have tried many cases. They reflected this experience in the competent and able manner in which they tried this case.

10. *The undesirability of the case.*—Cases involving discrimination claims frequently arouse animosities. This case was no different. Such cases are often more taxing on the attorneys outside the courtroom than within it. They require arduous labor and tremendous

dedication. An upward adjustment is called for to reward plaintiff's counsel for their willingness to handle this case, and to encourage other attorneys to handle similar cases in the future.

11. *The nature and length of the professional relationship with the client.*—Plaintiff appears to be a one-time client for this case only. This factor has no effect on the award.

12. *Awards in similar cases.*—The award in this case is within the reasonable range of fees previously allowed in similar cases.

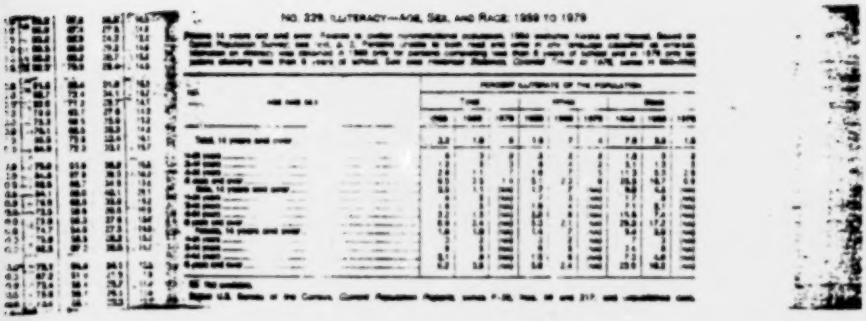
[5] The combined effect of these factors justifies an upward adjustment of attorneys' fees. The court finds reasonable attorneys' fees in this case to be $42,500.00.

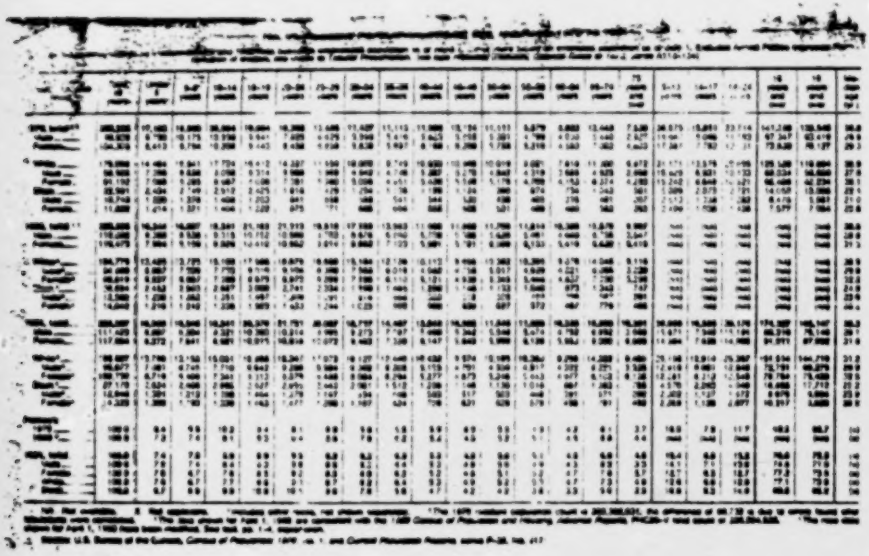
Plaintiffs are also entitled to recover witness expenses, costs of depositions, copying, long distance telephone calls, and other miscellaneous expenses in the amount of $1,129.39.

IT IS THEREFORE ORDERED that defendant pay to plaintiff's counsel the following sums:

Attorneys' fees	$42,500.00
Expenses	1,129.39
Total	$43,629.39

APPENDIX C





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No. 83-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN COOLIDGE GREENE,
Petitioner,

vs.

WHIRLPOOL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I.

Whether the Petitioner is barred from pursuing an action under the ADEA where he failed to file a written charge alleging unlawful discrimination on the basis of age as required by 29 U.S.C. § 626 (d).

II.

Whether the filing provision of 29 U.S.C. § 626 (d) is tolled where an employer does not post the required informational notices concerning age discrimination, *but* the claimant has actual notice of his rights, visits the appropriate agency within two weeks after the alleged discrimination took place, and receives and reads a pamphlet from the agency which sets forth information concerning age discrimination and does nothing thereafter.

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STATEMENT OF THE CASE

This action was brought under the Age Discrimination in Employment Act (ADEA). The District Court denied Respondent's Motion To Dismiss made at trial which was based upon the Petitioner's failure to file a charge of discrimination as required by 29 U.S.C. §626(d). The Court of Appeals for the Fourth Circuit reversed the District Court and held that the case should be dismissed because the Petitioner failed to comply with the requirements of §626(d). Thus, the issue involved in the Petition for Writ of Certiorari is whether the Petitioner is barred from bringing this action because he failed to file a charge alleging unlawful discrimination as required by 29 U.S.C. §626(d).

The Petitioner was 47 years old when he was hired by Respondent's Charlotte Branch as a Builder Territory Manager (salesman). In the late 1970's the Charlotte Branch began having serious personnel problems. Whirlpool sent representatives from its home office in Benton Harbor, Michigan to investigate the problems and to determine how to improve employee morale. As a result of these investigations, Whirlpool headquarters reorganized its Charlotte Branch in an effort to correct the personnel problems. Numerous employees of all ages were either transferred, demoted, or terminated. The Petitioner was one of those terminated during this period.

The Petitioner was terminated as of October 31, 1977. Approximately two weeks later, on November 17 or 18, 1977, the Petitioner went to the Department of Labor where he told Bob Smith that he thought he had been fired because of his age.[1] Smith instructed the Petitioner that if he found enough information regarding his claim of age discrimination to get back with the DOL. Smith also sent the Petitioner a booklet entitled "Discrimination in Employment" which explained Petitioner's rights and which he received on November 21, 1977. The Petitioner did not return to the DOL until two years

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[1] In 1977, when the Petitioner was required to file a charge, the DOL was the enforcing agency for the ADEA. However, on July 1, 1979, the responsibility for enforcement of the ADEA was transferred to the Equal Employment Opportunity Commission (EEOC). Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), *reprinted in* [1978] U.S. Code Cong. & Ad. News 9795.

later when all he did was to ask if it had a record of his visit in 1977. The Petitioner gave no additional information to the DOL nor took any other action regarding filing a charge.

The Petitioner is an educated man having completed two years of study at the University of New Hampshire. He acknowledged that he received the pamphlet explaining his rights under the ADEA and that he read it. However, he did nothing for two years. Then in 1979 he went to the DOL but at that time he still failed to comply with the basic requirement of filing a charge.

The District Court held that the Petitioner filed a charge both when he visited the DOL in November 1977 and again when he went in 1979. The District Court also held that Whirlpool's failure to post the required ADEA information notices tolled the time for filing a charge until September 1979. In making its decision the District Court ignored the evidence at trial regarding the Petitioner's visits to the DOL and also found facts not in evidence. The Petitioner attempts to create evidence by referring to the trial court's Order as a summary of the evidence. This bootstrapping effort fails because the trial court's findings were *simply contrary to the evidence*. In denying Whirlpool's motion to dismiss made at trial, the judge stated that although the Petitioner received the DOL explanatory pamphlet regarding age discrimination in November, 1977, ". . . the evidence does not show that Greene read and understood it . . . ." However, the Petitioner's own testimony illustrates that he read the pamphlet and everything in it. In relating his conversation with Mr. Smith in November, 1977, the Petitioner testified:

> A. He told me they were out of the booklets they had that explained the discrimination case . . .
> App., p. 1, *infra*.

The plaintiff's testimony regarding receipt of the pamphlet was:

> Q. Well, now, did you read it?
> A. Yes, I looked through the booklet.
> Q. You read everything that was in the book?
> A. I must have. I looked through the booklet.
> App., p. 2, *infra*.

The Petitioner read the pamphlet that *explained* age discrimination cases and at that point he was put on notice of the statutory filing requirements. Yet, he did not return to the Department of Labor for

two years, and when he did, "he didn't tell him [DOL agent] anything." App., p. 3, *infra*. Obviously, the Petitioner never filed a charge, written or oral, in 1977 or in 1979.

Consequently, the Petitioner's argument that he filed a charge is unsupported by the evidence. Therefore, as the Fourth Circuit determined, based upon the actual facts of record, rather than the unsupported findings of the trial judge, the Petitioner never filed a written charge of discrimination. Indeed, as found in the concurring opinion, he didn't even file an oral charge.

In reversing the District Court, the Fourth Circuit found that in order to uphold the underlying purpose behind the statute, a written charge is required to satisfy the elements of 29 U.S.C. §626(d). Further, the Fourth Circuit determined that no charge alleging unlawful discrimination had been filed by the Petitioner. Finally the Fourth Circuit recognized that although the 180 day filing provision of §626(d) can be *waived* or *tolled*, such was not appropriate in this case where the evidence was clear that the Petitioner had actual notice of his rights under the ADEA within two weeks after his termination. Petitioner here raises two issues: (1) whether the notice provision of 29 U.S.C. §626(d) is satisfied by filing an oral charge; and (2) whether the notice provision of 29 U.S.C. §626(d) is tolled where an employer fails to post notices setting forth information concerning age discrimination, but the claimant has *actual* notice of such information.

RESPONSE TO PETITION FOR CERTIORARI

Summary

I. The Fourth Circuit's decision holding that 29 U.S.C. §626(d) requires a written charge upholds the underlying purpose of the ADEA and is completely consistent with decisions of this Court and other circuits. The court's decision that no written charge was filed is supported by the evidence of record.

II. The Fourth Circuit recognized that a written charge is not a jurisdictional prerequisite to filing a suit in federal court under the ADEA and that the requirement can be *waived or tolled*. However, under the circumstances in this case — where the Petitioner had actual notice of the law within two weeks after his termination, neither waiver nor tolling were appropriate.

I.

The Fourth Circuit's Decision That 29 U.S.C. §626(d) Requires A Written Charge Upholds The Purpose Of The ADEA And Is Consistent With The Rulings Of This Court And Other Circuits.

A. The Underlying Purpose Of The ADEA Is Upheld By Requiring A Written Charge Alleging Unlawful Discrimination.

Clearly, in making its decision, the Fourth Circuit recognized the importance of the underlying purpose of the ADEA. As the Petitioner contends, the purpose of the statute is to protect the rights of the elderly. One of the quickest and most appropriate ways of enforcing those rights is through the conciliation and informal conference procedures provided for in the statute. The importance of §626(d) and the effect of the 1978 amendments were discussed by the Fourth Circuit in its opinion:

> Prior to 1978, §626(d) required that a "notice of intent to sue" be filed with the DOL. In 1978, this provision was amended to require that a "charge alleging unlawful discrimination" be filed with the DOL.[2] In approving this amendment, the Conference Committee reported:
>
> "This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation."
>
> H.R. No. 95-950, 95th Cong., 2 Sess. 12, *reprinted in* [1978] U.S. Code. Cong. & Ad. News 534. In the present case, because the Secretary had no knowledge of Greene's allegation of discrimination against Whirlpool, no opportunity existed for any informal methods of conciliation, conference and persuasion, as required by §626(b), before the initiation of the suit. This is patently contrary to the purpose of the notice requirement. (Footnote omitted).

As discussed by the Fourth Circuit, §626(d) allows the DOL to attempt to conciliate and thus eliminate any discrimination as quickly as possible. This protects the public as well as the private interest of the claimant.[2] The importance of the administrative proceedings provided for in the statute has long been recognized. While considering the type of damages to be allowed in an ADEA action, the Fourth Circuit, in *Slatin v. Stanford Research Institute*, 590 F.2d 1292, (4th Cir. 1979) stated:

> *The ADEA provides that resort must first be had to administrative remedies before a private suit may be filed.* Any individual who wishes to sue under the ADEA must give the Secretary of Labor sixty (60) days notice of intent to sue. Upon receipt of such notice, the Secretary is directed to "seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." 29 U.S.C. §626(d). If such efforts fail, the Secretary may bring an action under the statute. Most significantly, the right to bring a private suit terminates upon commencement of an action by the Secretary. §626(c). *Thus, the entire thrust of the ADEA's enforcement provision is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor.* (Emphasis added.)

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[2] Courts have consistently held that suit can be brought only after the 60 day conciliation period. *Ewald v. Great Atlantic & Pacific Tea Co., Inc.*, 620 F.2d 1183, 1188 (6th Cir. 1980) *vacated* and *remanded on other grounds*, 101 S. Ct. 311 (1980), *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195, 1198 (5th Cir. 1975); *Coyle v. Spigner*, 477 F.Supp. 23, 24 (D.S.C. 1979); *Reich v. Dow Badische Co.*, 575 F.2d 363, 368 (2d Cir. 1978), *cert. denied*, 439 U.S. 1006, 99 S. Ct. 749 (1978); *Bengochea v. Norcross, Inc.*, 464 F.Supp. 709 (E.D. Pa. 1979).

To allow the Petitioner to proceed with his action without having observed the statutory prerequisite of conciliation negates the purpose of the ADEA. In addition, to allow the Petitioner's actions to be sufficient to fullfill the requirement of filing a charge would be to say that anyone who makes inquiry of a federal agency has filed a charge and would make the language of the statute meaningless. Here, the Petitioner failed to give the agency the information necessary for them to start the wheels of conciliation rolling. Having completely bypassed the statutory requirement of filing a charge, the Petitioner is barred from proceeding with this action.

The Petitioner cites *Mahasco Corp. v. Silver*, 447 U.S. 807, 816 (1980) as the test for determining Congressional intent in enacting a statute. Respondent agrees that an application of the standards of *Mahasco* clearly indicates that a written charge is required under the provisions of 29 U.S.C. §626(d). The *Mahasco* test requires examination of three elements: (1) the language of the statute itself; (2) the legislative history; and (3) the policies underlying the statute.

Addressing the first element, as the Fourth Circuit found, the language of the statute requiring that a charge be filed, implies that something must be written. See also *Reich v. Dow Badische Co.*, 575 F.2d 363 (2nd Cir.), *cert. denied* 439 U.S. 1006 (1978) (decided before the 1978 amendments). Papers, documents, and pleadings are "filed," oral arguments and statements are not. Accordingly, the language of the statute itself supports the finding that a written charge is required. In addition, the EEOC, which is currently charged with promulgating and enforcing the provisions of the ADEA, requires that a charge must be written to be sufficient. See 44 FR 37,975 (June 29, 1979).

The legislative history, the second element, also mandates that a *written* charge of discrimination is required under §626(d) of the ADEA. As pointed out in *Fulton v. NCR Corp.*, 472 F.Supp. 377, 23 FEP Cases 1595, 1597 (W.D. Va. 1979):

> Any doubt about the necessity of a written charge should be dispensed by the enactment of the Amendments, however. The Conference Committee approving these Amendments reported, 'This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient

> information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the conference intends that the "charge" requirement will be satisfied by the *filing of a written statement* which identifies the potential defendant and generally describes the action believed to be discriminatory.' House Conf. Report No. 95-950, Mar. 14, 1978, p. 12, 1978 U.S. Code Cong. and Adm. New., p. 1006.

Indeed, in support of his argument that he had filed a charge of discrimination, the Petitioner at page 15 quoted the following language in his Petition:

> The Conferees intend that the 'charge' requirement will be satisfied by the filing of a *written statement* which identifies the potential defendant and generally describes the action believed to be discriminatory. (Emphasis added.)

The Petitioner, of course, emphasized other language in this quote and failed to underline the requirement of a "written statement." Considering the legislative history, there is no question that Congress intended that a *written charge* would be required to satisfy §626(d).

The third element of *Mahasco*, the underlying purpose of the act, was found by the Fourth Circuit to be conciliation and conference, not private enforcement. The requirement of a written charge seems to be the least that could be asked before the administrative agency undertakes its task to resolve the problem. By enacting §626(d) Congress obviously intended that some type record be made regarding all charges filed with the notice agency. While the Petitioner complains that the Fourth Circuit's opinion leaves it to the "subjective decision" of an employee of the government to determine whether a charge has been filed, the requirement of a written charge eliminates his objection. Whirlpool disagrees with the Petitioner's argument that an oral charge satisfies the filing requirement. But, if such were allowed, obviously, it would be better to rely upon the memory and judgment of trained agency personnel rather than the claimant, a partisan. Again, a written charge eliminates this issue.

B. The Cases Relied on By The Petitioner Do Not Support His Position That An Oral Charge Is Adequate.

In most of the cases cited by the Petitioner in support of his argument that a written charge is not required, the issues were *not whether written charges were required, but rather whether tolling was appropriate*. The Petitioner contends that the question of whether a written charge is required has created numerous conflicts among the courts. However, the real issue which has created conflict has not been written versus oral charges, but whether and under what circumstances the charge requirement could be tolled.

For example, in *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, (3rd Cir. 1977) the two issues were when the time for filing began and whether tolling was applicable. Whether a charge could be oral was never discussed by the court. Likewise, in *Moses v. Falstaff Brewing Corporation*, 525 F.2d 92 (8th Cir. 1975), the only issue was whether plaintiff's *written* notice of intent to sue was timely. In *Love v. The Pullman Company*, 404 U.S. 522, 92 S. Ct. 616, 30 L.Ed.2d 679, (1972), a Title VII case, the plaintiff also filed a written charge. In *Jennings v. American Postal Workers Union*, 672 F.2d 712 (8th Cir. 1982) the claimant filed an untimely charge alleging discrimination with the EEOC. Once again, the issue was whether the EEOC's earlier *refusal* to accept the claimant's charge was cause to toll the time period for filing.

Finally, the holding in *Woodford v. Kinney Shoe Corp.*, 369 F. Supp. 911 (W.D. Ga. 1973), a district court case repeatedly cited by the Petitioner and the District Court as support for allowing an oral charge, was specifically disapproved by the Court of Appeals for the Fifth Circuit in *Woodard v. Western Union Telegraph Company*, 650 F.2d 592 (5th Cir. Unit B 1981), holding that the plaintiff's action should have been dismissed for failure to file a written notice of intent to sue. In the only other case cited by the Petitioner, *Noto v. J.F.D. Electronics Corporation*, 446 F. Supp. 92 (E.D.N.C. 1978) the court relied upon *Woodford* to support its opinion that an oral charge would be sufficient. Obviously, since *Woodard*, such reliance is no longer valid.

Thus, a review of the Petitioner's cases reveals that, contrary to his contention, the Fourth Circuit's determination that a *written* charge is required is consistent with the opinions of this Court and other circuit courts.

C. The Evidence Clearly Reveals That The Petitioner Failed To File A Charge Alleging Unlawful Discrimination.

The Petitioner concedes that he filed no written charge and the Fourth Circuit held that was fatal. To avoid dismissal for failure to file a written charge, the Petitioner argues that an oral charge is sufficient and he filed an oral charge. Even if it would be sufficient to meet the filing requirement, there is no evidence the Petitioner filed an oral charge.

When the Petitioner went to the Department of Labor in 1977, the Petitioner told Mr. Smith ". . . that the only reason I could see that they discharged me was discriminating on age . . ." and that he thought he was fired because of his age. App., p.1, *infra*. The Petitioner further testified that Mr. Smith then told him to come back and see him, if the Petitioner had more information.

By telling the Petitioner to come back when he had more information, Mr. Smith clearly indicated that the Petitioner's information was insufficient for a charge. Obviously, the Petitioner's statement that he thought he was discharged because of his age was not enough.

When the Petitioner returned to the Department of Labor in 1979, he did not even attempt to file a charge of discrimination. Contrary to the erroneous finding of the trial judge, very little occurred during the Petitioner's second visit. In determining whether the Petitioner filed a timely charge in 1979, the trial court stated:

> Mr. Greene then returned to the Department of Labor, where he informed Mr. Fred Carlock of the Charlotte Office of the United States Department of Labor of the evidence of the willfulness on the part of the defendant which he had learned from the *Spagnuolo* case.

The undisputed evidence reveals that Mr. Greene did not inform Mr. Carlock ". . . of the evidence of the wilfullness on the part of the defendant. . ." nor did he inform Mr. Carlock of any additional information. In fact as shown by the following testimony of the Petitioner, he was "still gathering information" at the time he talked with Mr. Carlock.

Q. What did you tell him?
A. I didn't really tell him anything.
App. p. 3, *infra*.

Q. Did you tell the gentlemen in the Labor Department in the fall of '79 that you intended to sue Whirlpool?
A. I don't remember telling him anything at that time.
Q. Do you remember telling him anything other than you were looking for Mr. Smith?
A. I was still gathering information, sir, at that time.
Q. The last time you visited the Labor Department, you were still gathering information. Is that correct?
A. Oh, yes.
App., p. 5, *infra*.

Again, according to the Petitioner's own testimony, there is absolutely no evidence that he filed a charge as required by 29 U.S.C. §626 (d) on his first or second visit to the Department of Labor, nor is there any evidence to support the Petitioner's contention that the requirement should be waived. The Petitioner alone is responsible for his failure to file a charge of discrimination. Therefore, the Petitioner's action is barred by his failure to file a charge of discrimination as required by §626 (d).

II.

The Fourth Circuit's Decision That The Time Period For Filing A Charge Was No Longer Tolled Once Petitioner Received Actual Notice Of The Filing Requirements Is Consistent With The Rulings Of This Court And Other Circuits.

In order to avoid having his suit dismissed for failure to file a charge, the Petitioner contends that he should be excused from filing a charge because of the failure of Whirlpool to post a notice setting forth employees' rights under the ADEA. Failure to post notice relates only to lack of knowledge of one's rights under the ADEA. Once the Petitioner obtains actual knowledge of his rights under the ADEA, the failure to post by a defendant is no longer relevant and does not toll the time to file a charge. *Templeton v. Western Union Telegraph Company*, 607 F.2d 89 (5th Cir. 1979). *Smith v. President Lines*, 571 F.2d 102, 16 FEP Cases 712 (2nd Cir. 1978); *Kephart v. Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978); *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1978); *Edwards v. Kaiser Aluminum and Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975). The Petitioner knew enough about his rights to contact the DOL as early as November 1977—only two and one half weeks after his termination. Further three or four days later, the Petitioner received a pamphlet outlining all of his rights under the ADEA, including the applicable time limits and he did nothing until two years later when he learned that the person who fired him had won his discrimination case. Any way the facts are analyzed, it is unmistakenly clear that even if tolling were applicable in this case, it would be of no help to the Petitioner because he has yet to file a charge.

Finally, Petitioner attempts to set up a conflict between the Fourth Circuit's decision and that of other circuit's regarding the issue of tolling or waiver. The Petitioner contends that Whirlpool's failure to post the required notices containing information regarding the ADEA excuses him from the necessity of filing a charge of discrimination. He contends that the Fourth Circuit's holding that Whirlpool's failure to post the notice did not waive or toll the requirement of filing a charge of discrimination, conflicts with decisions of other circuits and causes confusion in the law.

In support of this position, the Petitioner contrasts two quotations — one from *Posey v. Skyline Corporation*, 702 F.2d 102 (7th Cir. 1983) and one from the Fourth Circuit's opinion in this case. However, in both quotations, the Petitioner omits the *very* next sentence from each of those opinions. The omitted language clearly reveals that rather than being in conflict, *the cases are completely consistent*.

The Petitioner's quote from *Posey* is as follows:

> [T]o insure that employers would not breach the posting requirement without penalty, as well as to effectuate the remedial purposes of the ADEA, we concluded in *Kephart* that the 180-day period was tolled by an employer's failure to post a conspicuous notice of ADEA rights (702 F.2d at 105).

The very next sentence is:

> Specifically, we held that if an employer fails to post in a conspicuous manner the required notice of ADEA rights, the 180 day period will not begin to run until the employee either retains an attorney or *acquires actual knowledge* of his rights under the ADEA. (702 F.2d at 105) (Emphasis added.)

Likewise, in quoting from the opinion of the Fourth Circuit, the Petitioner omitted the statements regarding actual notice. The quote from the Fourth Circuit's opinion set forth by the Petitioner is:

> Nevertheless, we do not agree with the district court that the 180-day time period for filing a charge was tolled by Whirlpool's failure to post the required ADEA informational notices on its premises.

The next two sentences which the Petitioner omitted are:

> The evidence clearly reveals that from Greene's first visit to the DOL in November, 1977, he acquired actual knowledge of the fact that a charge alleging discrimination must be filed with the DOL within 180 days after the alleged unlawful practice occurred. Therefore, under these circumstances, there is nothing to warrant the tolling of the usual 180-day filing requirement.

It is obvious that the Fourth Circuit's opinion is consistent with *Posey*. Failure to post ADEA notices constitutes grounds for a waiver of the filing requirement only when it impairs the claimant's ability to pursue his rights, which was not the case here. This Petitioner had actual knowledge of his rights under the ADEA, including the filing requirement, no later than two weeks after his termination.

CONCLUSION

Whirlpool submits that the Petition for Certiorari should be denied for the reasons that: (1) the Fourth Circuit's decision requiring a written charge alleging discrimination to be filed to satisfy the provisions of 29 U.S.C. §626 (d) upholds the underlying purpose of the ADEA and there is no conflict between the Fourth Circuit's decision and those of this Court and other circuit courts; and (2) the Fourth Circuit's decision that the time for filing a charge of discrimination was not tolled by Whirlpool's failure to post ADEA notices when the Petitioner had actual knowledge of his rights under the act is consistent with the opinions of this Court and other circuit courts.

Respectfully submitted this 25th day of November, 1983.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has this day served other parties in this action by causing three copies each of the foregoing Respondent's Brief In Opposition to Petition to be deposited in the United States Mail, postage prepaid and properly addressed to:

C. MICHAEL WILSON
Gerdes, Mason, Brunson & Wilson
Suite 1001 Cameron Brown Building
301 South McDowell Street
Charlotte, North Carolina 28204

This the 25th day of November, 1983.

/s/ JULIA V. JONES
Julia V. Jones

APPENDIX

Pages 372-374, 377-379 of Joint Appendix filed in the Appeal to the Fourth Circuit.

(372)

Q. Where was that office located?

A. 316 East Morehead Street.

Q. What did you tell Mr. Smith?

A. I went into the office and the receptionist referred me to Mr. Bob Smith's office. I went into Mr. Smith's office and I told him that I had worked for the Whirlpool Corporation all these years and that my performance had been okay, as far as I could determine; that the only reason I could see that they discharged me was discriminating on age because I was six weeks past 55. He kind of laughed, and he says I'm past 65 myself, but he says they can't force me to retire until I'm 70.

Q. Did you tell him you thought you were fired because of your age?

A. Yes, sir.

Q. What else did Mr. Smith tell you?

A. He told me they were out of the booklets they had that explained the discrimination case, but he also made the statement to me, he says I'll mail you one of those as soon as I can get one, and if you find it's willful and so forth, he says if you find out enough information on it you get back with us, and I says I'll certainly do that, Mr. Smith. He says you have got a time limit up to two years if you find they are willfully discriminating against you, and from that date on I never did get to see Mr. Smith again.

Q. Do you remember the date you saw him again?

(373)

A. It was in November of '77. I would say around the 17th, 18th or in that time frame there.

Q. Let me show you Plaintiff's Exhibit 88. Let me ask you if you can identify that.

A. Yes, sir.

Q. What is it?

A. That's the envelope mailed to me from the Department of Labor, Room 401, 216 East Morehead Street.

Q. And does that envelope contain a document?

A. Yes, sir. It has a date on it of November 21, 1977, and it has a document in it.

Q. What's the title of the document?

A. Discrimination in Employment Act of 1967 as Amended, Age Discrimination in Employment.

Q. Did you receive that document?

A. Yes, sir.

MR. WILSON: That's all the questions I have.

COURT: Cross-examination?

MR. ALLRED: Yes, Your Honor, just a little bit.

CROSS-EXAMINATION

BY MR. ALLRED:

Q. Mr. Greene, when you received the envelope from the Department of Labor which was postmarked November 21, 1977, did you receive it within a few days of November 21, 1977?

A. I must have, sir.

(374)

Q. Would it be fair to say you received it in November of 1977, within 30 days from the time that you had been terminated by Whirlpool?

A. Yes, sir.

Q. Did you read the booklet that was sent to you?

A. I glanced through the booklet, sir.

Q. Well, now, did you read it?

A. Yes, I looked through the booklet.

Q. You read everything that was in the book?

A. I must have. I looked through the booklet.

MR. ALLRED: Mr. Wilson, you might want to give Mr. Greene the booklet.

(Paperwriting handed to the witness)

Q. I direct your attention to Section 7 that begins on Page 4, and I direct your attention particularly to Section 7(d). Would you read Section (d) to the jury, please?

MR. WILSON: Your Honor, I'm going to object to that, because the section he's reading is not the section applicable to this case. It's the section Mr. Greene received but the amendment made retroactive by Congress made this particular language inapplicable to this case.

COURT: Is this going to present a question of law or a question of fact?

MR. WILSON: I think, Your Honor, it would be law.

COURT: If it's what the statute means, it would be my

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(377)

A. Probably was.

Q. December?

A. No, it was in the fall.

Q. In the fall?

A. Yes.

Q. Somewhere from September 21st to December 21st? I believe that's the fall.

A. If that is the fall of the year.

Q. Did you go and visit with this gentleman?

A. Yes, sir.

Q. What did you tell him?

A. I didn't really tell him anything. I went to visit with him and see if he had anything in the office where I visited with Mr. Bob Smith, and he really did. They remembered me visiting with Mr. Smith.

Q. Was there any record at all of your having visited with Mr. Smith?

MR. WILSON: Objection. He doesn't know if there was a record in the offices.

COURT: Do you know the answer to the question?

A. No, sir. How would I know if they had records, sir?

Q. You went to ask him if they had some. What did the gentleman at the Labor Department tell you?

A. He didn't say whether they had any or not, that I recall.

Q. Tell us the conversation.

(378)

A. I was talking about it, that I was in to see Mr. Smith at a prior time which Mr. Smith mailed me that information there and that Mr. Smith said whenever I had additional information that age discrimination was a factor in the case to get back with him. In the fall of '79 I had additional information that it was age discrimination. I went back to the Labor Department and asked Mr. Carlock.

Q. What did you tell Mr. Carlock?

A. I told him that I had been in to see Mr. Smith before and if Mr. Smith was around I would like to talk with him.

Q. He told you Mr. Smith was no longer there?

A. No, he did not say that.

Q. What did he tell you?

A. He didn't say anything about that. Mr. Smith had been transferred to Gastonia or some place.

Q. Did he say he would handle the matter for you?

A. He handled the matter as far as I was concerned.

Q. Did you tell him that you were going to file an intent to sue?

MR. WILSON: Objection. He's quoting again from the statute which is inapplicable.

COURT: Objection's overruled. Go ahead and answer the question.

Q. Did you tell the gentleman in the Labor Department in the fall of '79 that you intended to sue Whirlpool?

(379)

A. I don't remember telling him anything at that time.

Q. Do you remember telling him anything other than you were looking for Mr. Smith?

A. I was still gathering information, sir, at that time.

Q. The last time you visited the Labor Department, you were still gathering information. Is that correct?

A. Oh, yes.

Q. So you didn't communicate any intentions at all to the Labor Department at that time?

A. I don't remember whether I did or not.

MR. ALLRED: Thank you, sir.

MR. WILSON: Your Honor, may we approach the bench? I have redirect but I don't want to proffer the questions until I mention it to you.

(Conference out of the hearing of the court reporter)

COURT: We'll take our morning recess.

SHORT RECESS

(The following takes place out of the presence of the jury.)

(Mr. Greene returns to the witness stand.)

REDIRECT EXAMINATION

BY MR. WILSON:

Q. Mr. Greene, do you remember what month it was you went to the Department of Labor?

A. November, 1977.

Q. Was it October or November?